Belber Singh a/l Daulat Singh v Tetuan KK Lim & Associates

HIGH COURT (MUAR) — CIVIL SUIT NO 23–10 OF 2007
AHMADI ASNAWI JC
7 AUGUST 2009

Bankruptcy — Act of bankruptcy — Failure to pay judgment sum — Default judgment, whether final judgment — Bankruptcy Act 1967 s 3(1)(i)

Bankruptcy — Practice and procedure — Duties and liabilities — Director General of Insolvency — Publication and gazetting of debtor's bankruptcy — Whether statutory duty of insolvency department — Whether creditor's solicitors accountable for insolvency department's actions in carrying out its statutory duties

Civil Procedure — Judgment — Default judgment — Whether judgment in default of appearance final judgment

Legal Profession — Duty to client — Obligations of counsel — Solicitors acting upon client's instructions to commence bankruptcy proceedings against debtor — Subsequent publication and gazetting debtor's bankruptcy by insolvency department — Whether solicitors accountable for insolvency department's actions in carrying out its statutory duties — Whether solicitors accountable to debtor for malicious prosecution and/or defamation

The plaintiff stood as guarantor to a hire purchase agreement ('the agreement') between the hirer and the bank. The hirer failed to comply with the terms of the agreement and the plaintiff failed to make good his guarantee. The bank proceeded with legal action against the hirer and the plaintiff. The plaintiff failed to attend court and default judgment was entered against him. The action against the hirer was subsequently dismissed. On the bank's instructions, the defendant solicitors, initiated bankruptcy proceedings against the plaintiff on the default judgment. The bankruptcy notice and creditor's petition were both served on the plaintiff by way of personal service. On further instructions from the bank, the defendant entered a receiving order ('RO') and adjudication order ('AO') against the plaintiff. The plaintiff, with the consent of the Insolvency Department Director, subsequently set aside the default judgment and the RO/AO obtained against him. The plaintiff then sued the defendant solicitors for defamation, alleging that the solicitors had had wrongfully and maliciously

published reports of bankruptcy proceedings against him, grounded upon a default judgment that had been set aside. The plaintiff averred that this publication caused his banker to freeze his accounts, resulting in the plaintiff losing lucrative business. The defendant applied to strike out the plaintiff's action under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980.

Held, allowing the defendant's application with costs:

(1) The default judgment was at all material times a proper and final judgment within the meaning of s 3(1)(i) of the Bankruptcy Act 1967. It was capable of being enforced to the fullest. There was nothing irregular about the bank's action in instructing the defendant to institute the bankruptcy proceedings against the plaintiff (see paras 6 & 8); *Adzmi bin Ali & Anor v Mohamed Isa bin Kasad* [1987] 2 MLJ 199 (SC) followed.

(2) It was irrelevant at this stage to consider whether the bankruptcy notice and creditor's petition were properly served upon the plaintiff. The RO/AO were handed down by a court of competent jurisdiction which must have considered that the bankruptcy notice and creditor's petition were properly served. Until and unless they were set aside, the RO/AO were valid no matter under what circumstances they were procured. In any event the evidence clearly indicated that the bankruptcy notice and creditor's petition were properly served upon the plaintiff. The plaintiff engineered his own predicament by electing to ignore the said bankruptcy notice and creditor's petition (see paras 9–10).

(3) There was no evidence that the defendant had embarked on a malicious prosecution of the bankruptcy proceedings against the plaintiff as contended by the plaintiff. The gazetting and publication of the factum of the plaintiff's bankruptcy was the job of the Jabatan Insolvensi Malaysia ('JIM') pursuant to the RO/AO declared against the plaintiff. The same was equally true as regards to the freezing of the plaintiff's bank accounts. This was a statutory duty of JIM mandated by law as part of the procedural requirements in managing the bankrupt's estate upon its vesting with JIM. The defendant could not be made accountable for what JIM had done pursuant to its statutory duties and role. Neither could JIM's statutory duties and role over a subsisting RO/AO be questioned (see paras 13 & 16); *Kapt (B) Haji Mohammad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101 followed.

(4) The plaintiff's claim for business losses due to his bankruptcy was an empty claim. He had left his firm said to have suffered the losses, before being adjudged a bankrupt. In the instant case, the plaintiff's action was scandalous, frivolous or vexatious and was otherwise an abuse of the process of the court (see paras 18 & 21).

[Bahasa Malaysia summary

Plaintif bertindak sebagai penjamin kepada perjanjian jual beli ('perjanjian tersebut') di antara penyewa dan bank. Penyewa gagal untuk mematuhi terma-terma perjanjian tersebut dan plaintif gagal untuk membayar jaminannya. Bank meneruskan dengan tindakan undang-undang terhadap penyewa dan plaintif. Plaintif gagal menghadiri mahkamah dan penghakiman ingkar dimasukkan terhadapnya. Tindakan terhadap penyewa kemudiannya ditolak. Atas arahan bank peguamcara defendan memulakan prosiding kebankrapan terhadap plaintif atas penghakiman ingkar tersebut. Kedua-dua notis kebankrapan dan petisyen pemiutang diserahkan kepada plaintif melalui serahan tangan. Atas arahan selanjutnya daripada bank, defendan memasukkan perintah penerimaan ('RO') dan perintah penhukuman ('AO') terhadap plaintif. Plaintif, dengan izin Pengarah Jabatan Insolvensi, kemudiannya mengetepikan penghakiman ingkar tersebut dan RO/AO yang diperoleh terhadapnya. Plaintif kemudiannya menyaman peguamcara defendan dengan fitnah, mendakwa bahawa peguamcara telah secara salah dan berniat jahat menerbitkan laporan-laporan prosiding kebankrapan terhadapnya, berdasarkan penghakiman ingkar yang telah diketepikan. Plaintif menegaskan bahawa penerbitan ini menyebabkan bank membekukan akaunnya, mengakibatkan plaintif kehilangan perniagaan yang menguntungkan. Defendan memohon untuk membatalkan tindakan plaintif di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Penghakiman ingkar pada kesemua masa material adalah penghakiman yang betul dan muktamad dalam maksud s 3(1)(i) Akta Kebankrapan 1967. Ia boleh dikuatkuasakan dengan sepenuhnya. Tidak terdapat luar aturan mengenai tindakan bank dalam mengarahkan defendan untuk memulakan prosiding kebankrapan terhadap plaintif (lihat perenggan 6 & 8); *Adzmi bin Ali & Anor v Mohamed Isa bin Kasad* [1987] 2 MLJ 199 (MA) diikut.

(2) Adalah tidak relevan pada peringkat ini untuk mempertimbangkan sama ada notis kebankrapan dan petisyen pemiutang diserahkan mengikut aturan kepada plaintif. RO/AO diberikan oleh mahkamah yang berbidang kuasa kompeten yang telah mempertimbangkan bahawa notis kebankrapan dan petisyen pemiutang tersebut telah diserahkan secara betul. Sehingga dan jika ia diketepikan, RO/AO adalah sah tanpa mengira dalam apa keadaan pun ia diperoleh. Dalam keadaan ini, bukti jelas menunjukkan bahawa notis kebankrapan dan petisyen pemiutang tersebut diserahkan dengan tertib kepada plaintif. Plaintif sendiri yang mencari susah dengan memilih untuk tidak mengendahkan notis kebankrapan dan petisyen pemiutang tersebut (lihat perenggan 9–10).

(3) Tiada keterangan bahawa defendan telah memulakan pendakwaan dengan niat jahat prosiding kebankrapan terhadap plaintif seperti yang dihujahkan oleh plaintif. Pewartaan dan penerbitan faktum kebankrapan plaintif dilakukan oleh Jabatan Insolvensi Malaysia (JIM) berikutan RO/AO yang diisytiharkan terhadap plaintif. Begitu juga dengan pembekuan akaun bank plaintif. Ini adalah kewajipan statutori JIM yang diberi mandat oleh undang-undang sebagai sebahagian keperluan prosedur di dalam menguruskan estet seseorang bankrap selepas diletakhakkan dengan JIM. Defendan tidak boleh dipersalahkan atas apa yang telah dibuat oleh JIM berikutan kewajipan dan tugas statutorinya. Malah kewajipan dan tugas statutori JIM atas RO/AO juga tidak boleh dipersoalkan (lihat perenggan 13 & 16); *Kapt (B) Haji Mohammad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101 diikut.

(4) Tuntutan plaintif untuk kehilangan perniagaan akibat daripada kebankrapannya adalah tuntutan yang tidak bermakna. Dia telah meninggalkan firmanya yang telah dikatakan mengalami kerugian sebelum diputuskan bankrap. Dalam kes ini, tindakan plaintif adalah bersifat skandal, remeh atau menyusahkan dan jika tidak penyalahgunaan proses mahkamah (lihat perenggan 18 & 21).]

Notes

For cases on act of bankruptcy generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2272–2302.

For cases on default judgment, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3803–3838.

For cases on obligations of counsel, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1658–1659.

For cases on practice and procedure generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2831–2884.

Cases referred to

Adzmi bin Ali & Anor v Mohamed Isa bin Kasad [1987] 2 MLJ 199; [1987] CLJ (Rep) 37, SC (folld)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd [2001] 4 AMR 4807, HC (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (refd)

Kapt (B) Haji Mohammad bin Ismail v Perwira Affin Bank Bhd [2001] 5 MLJ 101, HC (folld)

Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet [2007] 1 MLJ 163; [2006] 5 CLJ 541, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1967 rr 97, 109, 111
Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Cedric Miranda (Cedric Miranda & Co) for the plaintiff.
Ana Shahrana Annuar (Ana Shahrana Annuar & Co) for the defendant.

Ahmadi Asnawi JC:

[1] The plaintiff filed this suit for defamation claiming relief for the part played by the defendant in the losses suffered by the plaintiff at Muar High Court.

[2] The plaintiff claimed that the defendant, a firm of solicitors, had wrongfully and maliciously published reports of bankruptcy proceedings instituted against him which was grounded upon a default judgment which had been set aside. The plaintiff averred that this publication was directed to his bankers, Hongkong and Shanghai Banking Corporation, which caused the said bank to subsequently freeze his accounts. This resulted in the plaintiff losing his lucrative business of supplying sprinkler systems and other fire fighting equipments to various government agencies. Thus the plaintiff claimed general damages for libel and slander and also special damages — see para 28(a)–(g) and (h)–(j) of the plaintiff's statement of claim.

[3] However, the defendant contended that the plaintiff's action was without basis and applied vide encl 7 to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC'), claiming the same to be scandalous, frivolous or vexatious and it is otherwise an abuse of the process of court.

[4] Having scrutinised the affidavit evidence before me, I gather the following facts:

(a) Through a hire purchase agreement dated 3 February 1996 entered between MBF Finance Bhd ('the bank') and Intan Puri Enterprise Sdn Bhd ('Intan Puri'), the latter agreed to hire a Mitsubishi Fuso Prime Mover bearing registration No JDV 2785 from the former. Under a guarantee and indemnity of hire purchase agreement, the plaintiff agreed to stand as guarantor and also agreed to jointly and severally guarantee upon written demand being made the due and punctual payment of all sums which may be due to the bank under or arising out of the said hire purchase agreement and the due performance and

observance by the hirer of each and every team and condition in the said hire purchase agreement to be performed and observed by the hirer, Intan Puri Enterprise Sdn Bhd.

(b) On account of Intan Puri's failure to comply with the terms and conditions of the said hire purchase agreement and the plaintiff's failure to make good his guarantee, the bank terminated the said hire purchase agreement and proceeded to sue both Intan Puri and the plaintiff at Mahkamah Sesyen, Batu Pahat for the recovery of certain sum, due under the said hire purchase agreement. The suit number is Saman No 52–1202 Tahun 1997. In this suit the plaintiff was cited as the second defendant while Intan Puri was made the first defendant.

(c) On 23 February 1998, default judgment was entered against the plaintiff (the second defendant in the said suit) on the account of the plaintiff's failure to appear before the court on the appointed date — see exh ZAM4, encl 7.

(d) Meanwhile, Intan Puri contested the claim and won and the bank's claim was dismissed on 30 June 2004. The bank subsequently lodged an appeal against this decision at Muar High Court.

(e) Upon the bank's instructions, the defendant (in the present suit) initiated a bankruptcy proceeding against the plaintiff based upon the said default judgment vide Kes Kebankrapan No 29–56 Tahun 2004. The bankruptcy notice ('BN') was served personally on the plaintiff on 23 March 2004 — see exh ZAM6 of encl 7. The creditor's petition ('CP') was also served personally on the plaintiff on 15 June 2004 — see exh ZAM8 of encl 7. Consequent thereto upon instructions from the bank, a receiving order and an adjudication order ('RO/AO') was entered against the plaintiff on 21 July 2004 — see exh ZAM9 of encl 7.

(f) On 13 January 2005, the plaintiff obtained the written sanction from the Director General of Jabatan Insolvensi Malaysia to proceed to set aside the said default judgment dated 23 February 1998. The plaintiff next proceeded to set aside the said default judgment by way of notis permohonan supported by the affidavit of the plaintiff affirmed on 13 March 2005.

(g) On 15 July 2005, the Mahkamah Sesyen Batu Pahat allowed the said application to set aside the said default judgment.

(h) On 14 December 2005 the plaintiff applied by saman dalam kamar to set aside the RO/AO obtained against him by the bank on 21 July 2004.

(i) On 4 January 2006 the Mahkamah Tinggi Kuala Terengganu allowed the said application by consent with no order as to costs. The plaintiff was discharged of his bankruptcy effective 4 January 2006.

[5] From the facts enumerated above, the primary issue before me would be whether the bank, armed with the said default judgment, through the services of the defendant is entitle to initiate the said bankruptcy proceedings against the plaintiff, in terms of the issuance of the bankruptcy notice, creditor's petition and finally obtaining the RO/AO against the plaintiff.

[6] There is no dispute that a default judgment was entered against the plaintiff on 23 February 1998. There is also no dispute that the said default was only set aside on 15 July 2005. Equally there is no dispute that the RO/AO was obtained on 21 July 2004, more than a year before the said default judgment was set aside. There is also no dispute that at all material times the said default judgment was never ever stayed before being set aside. In such event it is my view that the said default judgment was at all material times a proper judgment bearing a finality within the terms of s 3(1)(i) of the Bankruptcy Act 1967, its terms of which is capable of being enforced to the fullest.

[7] I am fortified in my view by the following principles enunciated by the Supreme Court in *Adzmi bin Ali & Anor v Mohamed Isa bin Kasad* [1987] 2 MLJ 199; [1987] CLJ (Rep) 37:

> Now when a defendant fails to enter an appearance to a writ for an unliquidated sum, the plaintiff may enter interlocutory judgment against him for damages to be assessed (see O 13 r 2 of the Rules of the High Court 1980). On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults In entering an appearance within a specific time, final judgment for the sum claimed may be entered against him (see O 13 r 1(1)). The court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order (see O 13 r 8). In our opinion, the word order in O 13 r 8 means a 'final' judgment under O 13 r 1(1) or an 'interlocutory' judgment under O 13 r 2 thereof. The term 'interlocutory' judgment means that such a judgment is interlocutory only as to amount and is final as to right of the plaintiff to recovery damages.

[8] The bank's claim against the plaintiff in Saman No 52–12–2 of 1997 is liquidated in nature. On the appointed date the plaintiff failed to appear in court to contest the claim or otherwise though the summons was served upon him. The court thereby ordered a default judgment to be entered against him for the sum claimed by the bank. Applying the principles enumerated above the default judgment thereby obtained would constitute a final judgment for the amount claimed by the bank against the plaintiff. The

said default judgment squarely falls within the meaning of the final judgment under s 3(1)(i) of the Bankruptcy Act 1967. Under the proviso of the said section the bank is deemed to be entitled to enforce the said default judgment as a creditor. On the facts there is nothing irregular about the bank's action in instructing the defendant to institute the said bankruptcy proceedings against the plaintiff. The bank's conduct was above board. Equally was the defendant's action in filing the bankruptcy proceedings who merely acted upon the bank's instructions and when there was a legal basis to do so.

[9] It is irrelevant at this stage to consider whether the said BN and CP were properly served upon the plaintiff or otherwise. It is a different matter altogether. The RO/AO was handed down by a court of competent jurisdiction who must have considered that the BN and CP were properly served. Until and unless it is set aside, the said RO/AO is valid no matter under what circumstances it was procured.

[10] In any event the evidence clearly indicates that the said BN and CP were properly served upon the plaintiff as shown in exhs ZAM6 and ZAM8 of encl 7. The plaintiff signed on the reverse side of the both the documents to signify his acknowledgement of receiving the two documents. The mode of service preferred by the defendant is properly done pursuant to rr 97, 109 and 111 of the Bankruptcy Rules 1967. I can find no fault with this mode of service. Additionally the plaintiff also admitted receiving the said BN and CP as evinced by his own affidavit affirmed on 13 March 2005 pursuant to his notis pemohon to set aside the said default judgment entered against him — see exh ZAM11, encl 7. At para 6(c) the plaintiff states:

> Dalam bulan September semasa saya membuat semakan di dalam rumah, saya melihat saya ada satu notis kebangkrapan bertarikh 19.2.2004 dan satu permohonan sipiutang bertarikh 29.4.2004. Saya ada menerima kedua-dua dokumen-dokumen ini tetapi pada masa penerimaan dokumen-dokumen ini saya tidak tahu apakah implikasinya sehingga saya telah mendapat nasihat dari peguam saya sekarang ...

[11] This statement clearly confirmed that the plaintiff was properly served with the said BN and CP as averred all along by the defendant. This fact also confirmed that there was effective service of the said documents upon the plaintiff and that the same was brought to the knowledge of the plaintiff. The plaintiff engineered his own predicaments by electing to ignore the said BN and CP.

[12] The plaintiff's subsequent denial of receiving the said documents as evinced at paras 9 and 12 in his affidavit affirmed on 7 June 2007, exhibited as ZAM19 in encl 7 is of no consequence either as it was against the grain

of the body of evidence that the said BN and CP were infact properly served upon him. Equally it merely goes to show that he did not come to court with clean hands. Appearing in court with such divergence on a single issue is almost conduct amounting to perjury.

[13] On the facts I could find no evidence that the defendant had indeed embarked on a malicious prosecution of the bankruptcy proceedings against the plaintiff as contended by the plaintiff.

[14] The plaintiff further complained that the defendant had wrongfully and maliciously published report of the bankruptcy proceedings instituted against him in the newspapers and gazette, tarnishing this reputation and resulting in the freezing of his bank account with Hongkong and Shanghai Banking Corporation, which consequently led to losses of his lucrative business dealings.

[15] However such publications was not exhibited anywhere in the plaintiff's affidavit in reply for the court's scrutiny and determination. Additionally the evidence shows that the service of the BN and CP were not effected by substituted service by way of publication of advertisement of the same in the newspapers but by way of personal service of which as reiterated earlier, the plaintiff had admitted receiving the same. Obviously this is a non-issue altogether.

[16] The gazetting and publication of the factum of the plaintiff's bankruptcy is obviously the job of Jabatan Insolvensi Malaysia ('JIM') pursuant to the RO/AO declared against the plaintiff. The same is equally true as regards to the freezing of the plaintiff's bank accounts. This is a statutory duty of JIM mandated by law as part of the procedural requirements in managing the bankrupt's estate upon its vesting with JIM. The defendant cannot be made accountable for what JIM has done pursuant to its statutory duties and role. Nor can JIM's statutory duties and role over a subsisting RO/AO be questioned. In this regard I am in full agreement with the views expressed by the learned judge in *Kapt (B) Haji Mohammad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101:

> Firstly, it is obvious that the plaintiff could not maintain a claim in defamation against the defendant because the publication of the advertisement was by the OA, and that was done pursuant to his duty to do so and that such publication was of true facts in that the plaintiff was indeed adjudicated a bankrupt on 5 July 1993.

[17] The defendant's case falls squarely within the ambit of this legal proposition. It is clear that defamation is not actionable on account of the publication of the fact of such bankruptcy by JIM.

[18] As regards to the plaintiff's claim of business losses suffered by his firm trading under BMJ Trading, the information as evinced from exh ZAM12 (a company search from Suruhanjaya Syarikat Malaysia) at p 4 listed the plaintiff under 'MAKLUMAT PEMILIK MASA DAHULU'. Further details indicated the following — 'TARIKH MASUK: 01.05.1985 TARIKH KELUAR: 13.04.2005 SEBAB KELUAR: TARIK DIRI'. This document clearly showed that the plaintiff left the firm on 13 April 2003 long before he was made a bankrupt on 21 July 2004. This fact was not rebutted by the plaintiff in his affidavit in reply, encl 5A. The plaintiff did not also offer any explanation to account the same. In such event, based on this uncontroverted evidence, it is my view that the plaintiff's claim for business losses due to his bankruptcy is verily an empty claim. He had left the firm before he was adjudged a bankrupt. He has nothing to do with BMJ Trading anymore. Hence his bankruptcy was of no consequence on the performance of BMJ Trading in so far as BMJ Trading is concerned.

[19] It is trite that the word 'scandalous' as employed in O 18 r 19(1)(b) of the Rules of the High Court is taken to mean 'wholly unnecessary and irrelevant', not just unpleasant allegations (see *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd* [2001] 4 AMR 4807; *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163; [2006] 5 CLJ 541). Whereas the word 'frivolous' or 'vexatious' means 'obviously unsustainable' (see *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet*).

[20] As regards to the meaning of 'it is otherwise an abuse of the process of the court' (O 18 r 19(1)(d)) the Court of Appeal, Singapore in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at p 384 said:

> The term 'abuse of process of the court' in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and interests of justice. This term signifies that the process of the court must be used bone fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for collateral purpose... if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior motive on collateral purpose, it might be struck out as an abuse of the process of the court.

[21] On the facts, the action instituted by the plaintiff against the defendant falls squarely within the four walls of the authorities enumerated above. Hence I allowed the defendant's application vide encl 7 with costs.

Defendant's application allowed with costs.

Reported by Andrew Christopher Simon